Supreme Court, U.S.
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88-741

No. -

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

CLALLAM COUNTY, et al.,

Petitioners/Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION OF THE STATE OF WASHINGTON,

Respondents/Defendants.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY
THEODORE O. TORVE*
5th Floor Highways-Licenses Building
Olympia, WA 98504
(206) 753-6126
Attorneys for Petitioners and Counsel of Record (*)

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TABLE OF CONTENTS

	Page
RELEVANT STATUTORY PROVISIONS	1
FEDERAL JURISDICTION	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. The Petition Does Not Present Any Special Or Important Reasons For The Court To Grant A Writ Of Certiorari	5
B. The Ninth Circuit's Decision Is Correct	6
C. The Ninth Circuit's Decision Is Fair	7
D. The Ninth Circuit Was Entitled To Give Deference To FHWA's Interpretation Of Applicable Statutes	7
CONCLUSION	8
Appendices:	
Appendix A — Excerpt From Section 2 of the Washington Toll Bridge Authority Bond Issue	1a
Appendix B — Excerpt from Section 15 of the Washington Toll Bridge Authority Bond Issue	3a
Appendix C — Excerpt of Letter from John S. Hassell, Jr., Deputy Administrator, FHWA, to Honorable Dixie Lee Ray, Governor, State of Washington, dated March 6, 1979	6a
Appendix D — Excerpts of Memorandum from Mr. Morgan, Associate Administrator, FHWA, to L. E. Lybecker, FHWA Regional Administrator, Portland, Oregon, dated May 21, 1979	8a
Appendix E — Excerpts from Memorandum from Assistant Chief Counsel, FHWA, to Mr. Lorenzo Casanova, Chief Counsel, FHWA, dated June 20, 1979	11a
Appendix F — Excerpts from United States Supreme Court Rule 17.1	13a

TABLE OF AUTHORITIES

CASES

	Page
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 137 (1972)	8

STATUTES

23 U.S.C. § 125	3
23 U.S.C. § 129	3
23 U.S.C. § 129(a)	1, 2, 3, 5, 6, 7
23 U.S.C. § 301	1, 6, 7
28 U.S.C. § 1331	2
RCW 47.60.350	2
RCW 47.60.370	2

REGULATIONS

23 CFR § 668.105(d)	1, 2
23 CFR § 668.107(b)	6

UNITED STATES SUPREME COURT RULES

Rule 17.1(c)	1, 5

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RELEVANT STATUTORY PROVISIONS

The pertinent provisions of the Statutes and Regulations involved are 23 U.S.C. § 301, 23 U.S.C. § 129(a), 23 CFR § 668.105(d), and United States Supreme Court Rule 17.1(c) and are set forth in Pet.'s App. E, pp. 55a-57a.

FEDERAL JURISDICTION

Original federal jurisdiction in this case rests on federal question jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE CASE

The enactment and the content of the "129(a) Agreement" between FHWA and WSDOT on May 20, 1980 was a result of a number of communications and positions taken by FHWA immediately after the destruction of the Hood Canal Bridge.

It was clear that FHWA would grant emergency relief funds for the reconstruction of the west portion of the bridge but would require the execution of an agreement under the provisions of 23 U.S.C. § 129(a). (Pet.'s App. E, pp. 55a-56a) It was clear FHWA was not going to provide 100% funding for the entire cost because of the possibility of insurance proceeds being available to the state. This position was taken because of the language of 23 CFR § 668.105(d). (Pet.'s App. E, p.57a)

The existence of the insurance proceeds resulted from the historic actions establishing the Hood Canal bridge.

The bridge was conceived in the early 1950's. In order to make it a financially feasible project, several bond issues were converted into a single bond issue in 1961 for construction of the bridge and financing of improvements for the interdependent ferry system utilizing both toll and ferry revenues for debt service. (App. A, pp. 1a-2a) In addition to pledging of tolls and ferry system revenues, the State dedicated ¼ cent of gas tax revenue to guarantee the payment of principal and interest of the bonds by creation of the Puget Sound Reserve Account in RCW 47.60.350 and .370. The new bonds eventually issued in 1963 were 40-year term bonds maturing in 2002.

The Bond Resolution provided that all tolls and other revenues, including taxes be paid into a fund that would be used to pay the maintenance and operation costs including insurance premiums. Net revenues than go to pay principal and interest. Section 15 of the Bond Covenants provides:

> All other monies collected on any other [property damage] insurance shall, at the option of the Authority (a) be used to pay any loss suffered by the Authority for which such monies were collected, (b) be applied to replacement, reconstruction, or restoration of the property damage to at least the same good order, repair and condition as it was prior to the damage, or (c) be used to retire outstanding bonds. The Bond Resolution constitutes a contract between the State and the Bondholders.

(App. B, pp. 3a-5a)

Immediately after the Hood Canal Bridge was destroyed, Governor Ray declared an emergency on February 15, 1979 and requested that the United States Secretary of Transportation concur. On March 6, 1979 the Deputy Administrator for FHWA on behalf of the Secretary concurred with the Governor's proclamation and determined that, subject to the 23 U.S.C. § 129, the State was eligible for emergency funding under 23 U.S.C. § 125. (App. C, pp. 6a-7a) On May 21, 1979 a memorandum from Mr. Morgan, the Associated Administrator for Engineering and Traffic Operations of FHWA to Mr. L. E. Lybecker, FHWA Regional Administrator in Portland, Oregon was made available to the State. In it the insurance proceeds were discussed by Mr. Morgan stating:

> Since the insurance compensation is not specifically for another purpose, it must be used to reduce the federal share of the construction costs. The use of the insurance compensation to pay eligible construction costs would be a state cost of construction which could be recovered by collection of tolls pursuant to 23 U.S.C. § 129. Counsel should be involved in the disposition of the above toll and insurance issues.

(App. D, pp. 8a-10a)

In June of 1979, Assistant Chief Counsel of FHWA in a memorandum sent to FHWA Chief Counsel discussing a proposed 23 U.S.C. § 129(a) agreement stated that the State would be allowed to recover tolls to the State's share of the cost of construction, less operation and maintenance, were received. He stated "the insurance compensation would be the State's share." (App. E, pp. 11a-12a)

On May 28, 1980 the 23 U.S.C. § 129(a) agreement was executed between FHWA and the State of Washington. In accordance with FHWA's instructions, section 3 stated:

> 3. It is agreed that all property damage insurance proceeds received by the State as a result of the partial destruction of the original Hood Canal Bridge (together with interest thereon) shall be used for reconstruction of the bridge so as to reduce the amount eligible for Federal Emergency Relief Funds and shall be deemed construction costs paid by the State.

Pet.'s App. F, p. 65(a).

The insurance proceeds were paid to FHWA in April of 1983. The state then assumed responsibility for and paid $11.6 million to its contractor to complete construction. FHWA had suggested and agreed that the proceeds could be held by the state until 1985. The interest would then be used to pay the state's share of reconstruction of the surviving east half of the bridge. A new FHWA director reversed this position. FHWA and the state eventually agreed that a portion of the interest earned would constitute part of the state's cost of construction based upon a declining balance assuming the state had immediately expended the sums for reconstruction.

The date of repayment was also a result of a suit by the bondholders attempting to keep the proceeds held intact until the bridge was completed based upon the bond covenants. In December of 1982 the State Superior Court allowed the state to use the interest and insurance to reimburse FHWA for the emergency funds used on the bridge.

SUMMARY OF ARGUMENT

The petition does not present any special or important reasons for the court to grant a Writ of Certiorari. The decision below is a narrow one which is unlikely to occur and does not affect broad, important or substantive programs, positions or laws.

The Ninth Circuit's decision was correct in compliance with the plain meaning of the statutes involved. The result reached by the court which upheld the actions of FHWA is a fair result considering all the facets of the situation which presented itself to FHWA for enactment of an agreement.

ARGUMENT

A. The Petition Does Not Present Any Special Or Important Reasons For The Court To Grant A Writ Of Certiorari.

Petitioners rely on Rule 17.1(c) set forth in App. F, pp. 13a-14a. The provision states:

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but which should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

Petitioners have stated that the issue has not been decided by this court or any other jurisdiction. Although this is true, there is no demonstrated reason why it should be so resolved. There is no conflict with any applicable decisions of this court or of any other court.

The Ninth Circuit's decision that FHWA's interpretation that the insurance proceeds and interest thereon were not federal contributions but state costs of construction was not arbitrary or capricious or an abuse of discretion and was in accordance with the plain meaning of Section 129(a).

The Ninth Circuit's decision was a review of a federal agency's action. FHWA's decision in enacting the 129(a) Agreement was based upon not only the statutory language but the origin of the State's proceeds, its availability, the history of the construction of the original bridge and the situation the State found itself in. FHWA's action is not the kind of agency action that has an important impact on other federal programs, policies or other laws.

As pointed out by the Petitioners, there is only one other 129(a) Agreement in existence that dealt with insurance proceeds. That agreement involved an entirely different set of circumstances involving State contributions and provides no necessity for the highest judicial review of FHWA's action in this situation. FHWA's actions were consistent with each action. This case is fairly unique and not apt to be duplicated.

The court's decision is not inconsistent with applicable rules of statutory construction. The Ninth Circuit found that FHWA's interpretation of 23 U.S.C. § 129(a) was in accord

with its plain meaning. This was a straightforward interpretation of a statute. The decision does not affect any established statutory rules of construction. It merely found those advanced by Petitioner were not applicable.

B. The Ninth Circuit's Decision Is Correct.

Petitioners' argument relating to what constitutes "costs of construction" is an attempt to draft onto 23 U.S.C. § 129(a) a concept not included in its plain language. Petitioner seeks to restrict the source of funds that might be contributed by the State. Petitioner would permit recovery in tolls from only monies obtained in certain situations. Nothing in the language of 23 U.S.C. § 129(a) or 23 U.S.C. § 301 attempts to limit the State's source of funding. As pointed out by the Ninth Circuit, this concept could in fact impede or prevent a State in participating in the federal program. This would be especially true where FHWA found no special circumstances to exceed the 75% amount stated in 23 CFR § 668.107(b) cited by Petitioners.

The Ninth Circuit rightfully rejected Petitioner's argument that the State's insurance and interest proceeds somehow were converted into federal funds never belonging to the State. In short, the Pet.'s argument is an argument that insurance proceeds were "that part contributed by the United States", a position not in accordance with the facts of this case. The assertion that the federal government contributed 100% of the funding is not supported by the facts and was rejected out of hand by the Ninth Circuit.

The insurance proceeds clearly belonged to the State in accordance with the bond conditions which required the State to either reconstruct the bridge or retire the bonds. Neither State law nor Federal law transferred title to such funds to the United States. This was only accomplished through the provisions of the 129(a) Agreement as an agreed-upon reimbursement for advanced federal emergency relief funds. The timing and procedure as to when the reimbursement was to made was part of the Agreement and did not make the funds any less costs of construction, nor the funds paid directly to the contractor.

C. The Ninth Circuit's Decision Is Fair.

Nothing in 23 U.S.C. § 301 or § 129(a) places any restriction on what purposes recovered toll revenue may be used by the State. The Federal statutory scheme clearly authorizes the recovery of tolls in the amount of the State's contribution to the cost of the bridge. This is not a windfall to the State.

In this case, that is particularly true because such tolls are by statute and agreement set aside for the maintenance and operation of the facilities covered by the bond covenants as well as payment of interest and principal for the bonds which will not be retired until the year 2002.

Without utilization of the insurance proceeds the public would not have had a reconstructed bridge and the State clearly would have had to utilize the insurance proceeds to retire the existing bonds. Clearly the public and members of Pet.'s class understood and reasonably anticipated that the tolls would remain on the bridge for the 40-year term of the bonds until 2002. The financing of the reconstruction in part by the federal government does not change this concept.

D. The Ninth Circuit Was Entitled To Give Deference To FHWA's Interpretation of Applicable Statutes.

FHWA's interpretation deserve great deference especially in the light of the fact the Ninth Circuit's interpretation of 23 U.S.C. § 129(a) and 23 U.S.C. § 301 was similar.

The interpretation is consistent with both of the statutes. Nothing in 23 U.S.C. § 301 remotely suggests that 23 U.S.C. § 129(a) is to be given an artificial and limited interpretation. It clearly exempts from the toll-free concept those situations provided for in Section 129, specifically enumerating toll bridges. The introductory statements in 23 U.S.C. § 129(a) clearly indicates it is a separate concept and not governed by 23 U.S.C. § 301 with the statement that it applies "not withstanding the provisions of Section 301."

FHWA's interpretation relating to the treatment of the insurance proceeds has been consistent since the disaster, considering those funds as "costs of construction." Florida's agreement dealt with a myriad of funds contributed by that

State constituting "costs of construction." Florida never had requested that the insurance proceeds be treated as costs of construction nor apparently was that necessary. FHWA's position was that the State had to request that type of treatment. FHWA's treatment of insurance proceeds thus was not inconsistent between the two situations.

The United States originally appealed the District Court's decision. The State withdrew its appeal contesting the United State's position on that portion of the District Court's decision relating to the interest. In addition, a stipulation was entered withdrawing the government's appeal. The failure to participate in the appeal does not signify the agency has changed its position. The basis for its decision to leave the appeal to the State is not disclosed by the record and could have been based on many factors including priorities and costs. Nothing in the record suggests FHWA has changed its position on the treatment of the insurance proceeds. The Ninth Circuit Court's review is consistent with the concepts set forth in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L.Ed.2d 137 (1972). FHWA's decision and interpretation of the pertinent statutes was based upon the relevant factors and was free from any clear error of judgment.

CONCLUSION

The Court is respectfully requested to deny the Petitioners' petition for a Writ of Certiorari

DATED this 30th day of November, 1988

Respectfully submitted,

KENNETH O. EIKENBERRY
THEODORE O. TORVE*
Senior Asst. Attorney General
Attorneys for Petitioners and
Counsel of Record(*)

APPENDIX A

EXCERPT FROM THE WASHINGTON TOLL BRIDGE AUTHORITY BOND RESOLUTION SECTION 2

Payment for the retirement of the Bonds and any additional revenue bonds hereafter issued in parity therewith in accordance with the provisions of Section 30 hereof, by redemption or otherwise, and payment of interest thereon are secured by a first and prior charge against and lien upon all of the tolls and revenues of the Ferry System and all funds created by this Resolution, except the Revolving Fund, and all moneys at any time therein and on any interest which may be earned from the deposit or investment of any such tolls and other revenues and against the Puget Sound Reserve Account of the Motor Vehicle Fund created by Chapter 7, Laws

of 1961, Ex. Ses., of the State of Washington, and, to the extent that all revenues from the Ferry System and the Hood Canal Bridge available therefor are insufficient to provide for the payment of principal and interest on the Bonds and for sinking fund requirements established with respect thereto and the required payments into the Ferry Improvement Fund, against all revenues derived from the 1/4-cent of motor vehicle fuel tax and 1/4-cent of fuel tax required by law to be deposited in the Puget Sound Reserve Account, except for payment of costs of operation, maintenance and necessary repairs of the Ferry System, and all of said tolls and revenues and pledged Puget Sound Reserve Account moneys are hereby irrevocably pledged for the payment or redemption of the Bonds and interest thereon . . . .

APPENDIX B

EXCERPT FROM THE WASHINGTON TOLL BRIDGE AUTHORITY BOARD RESOLUTION

Section 15. So long as any of the Bonds remain outstanding, the Authority shall cause to be procured and at all times maintained with an insurance company or companies authorized to do business in the State of Washington adequate insurance, to the extent procurable, and subject to such deductibles as may be determined advisable by it, upon all ferries as follows:

. . . .

(2) Protection and Indemnity insurance against liability arising out of claims and liabilities which are

customarily covered by such insurance on vessels.

The Authority will also at all times cause to be maintained with an insurance company or companies authorized to do business in the State of Washington adequate insurance, to the extent procurable, upon any bridge or bridges, slips, piers, wharves, docks, buildings and other terminal structures constituting any part of the Ferry System against loss or damage to the extent customarily carried by operators of similar properties.

. . . .

All other moneys collected on any other insurance shall, at the option of the Authority (a) be used to pay any loss suffered by the Authority for which

such moneys were collected, (b) be applied to replacement, reconstruction, or restoration of the property damaged to at least the same good order, repair and condition as it was in prior to the damage, or (c) be used to retire outstanding Bonds.

APPENDIX C

EXCERPT OF LETTER FROM JOHN S. HASSELL, JR., DEPUTY ADMINISTRATOR, FHWA, TO HONORABLE DIXIE LEE RAY, GOVERNOR, STATE OF WASHINGTON, DATED MAY 21, 1979

Pursuant to Section 125 of Title 23, United States Code, I concur in your proclamation of February 15, 1979, declaring an emergency as a result of the failure of the Hood Canal Bridge on State Route 104 on February 13, 1979. A copy of your proclamation and additional information on the catastrophic failure of this bridge was sent to us by the Washington State Department of Transportation with the State's application for emergency funds and a request to increase the Federal share to 100 percent of eligible costs.

Subject to the provisions of Section 129 of Title 23, United States Code, regarding toll bridges and ferry operations, I find the cost of repair or reconstruction of the Hood Canal Bridge eligible for emergency funding under Section 125. I further find it to be in the public interest to increase the Federal share of such work to 100 percent of eligible cost.

The Washington State Department of Transportation is being notified of this approval through our Washington Division Administrator, Mr. Paul C. Gregson.

APPENDIX D

EXCERPTS FROM MEMORANDUM FROM MR. MORGAN, ASSOCIATE ADMINISTRATOR, FHWA, TO L. E. LYBECKER, FHWA REGIONAL ADMINISTRATOR, PORTLAND, OREGON DATED MAY 21, 1979

Federal fund eligibility of all permanent and temporary work related to reconstruction of the Hood Canal Bridge is subject to execution of an agreement pursuant to 23 U.S.C. 129 if any tolls are to be charged on the rebuilt structure or the temporary structure. The Federal Highway Administration approval of a Section 129 agreement is subject to there being State construction costs to be repaid. Such costs may include:

(a) construction costs of the old bridge which are in excess of the net amount of all tolls

received less maintenance, operation and debt service costs, and which are not in excess of the value of the remaining portion of the old bridge, and

(b) construction costs of the new bridge, including emergency repairs, paid by the State.

. . . .

Since the insurance compensation is not specifically for another purpose, it must be used to reduce the Federal share of the construction costs. The use of the insurance compensation to pay eligible construction costs would be a State cost of construction which could be recovered by collection of tolls

pursuant to 23 U.S.C. 129. Counsel should be involved in the disposition of the above toll and insurance issues.

(Emphasis added.)

APPENDIX E

EXCERPTS FROM MEMORANDUM FROM CHIEF COUNSEL, FHWA, TO MR. LORENZO CASANOVA, CHIEF COUNSEL, FHWA, DATED JUNE 20, 1979

It is our understanding that Regional Counsel, Robert Rutledge, will take the lead in preparing a 23 U.S.C. 129(a) agreement covering the Hood Canal Bridge. We have sent a sample agreement and will be available for consultation if needed.

Present proposals would allow the State to charge tolls on the temporary and permanent structures until the State's share of the cost of construction, less operation and maintenance, are recovered as follows:

(a) construction costs of the old bridge still outstanding but not to exceed the current value of the remaining portion of the old bridge. The figures developed should be verified by audit.

(b) construction costs of the temporary and new bridge, including emergency repairs paid by the State. The insurance compensation would be the State's share.

APPENDIX F

EXCERPTS FROM UNITED STATES SUPREME COURT RULE 17.1

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court.